Oliver et al. v. City of Shattuck ex rel. Versluis,
157 F. 2d 150.....6, 10

Root Refining Co. v. Universal Oil Products Co.,
169 F. 2d 514.....3, 16

Saenz et al. v. Kennedy et al., 178 F. 2d 417.....6, 12

Turner v. Alton Banking and Trust Co.,
181 F. 2d 899..... 1
186 F. 2d 206..... 2, 8

Universal Oil Products Co. v. Root Refining Co.,
328 U. S. 575.....6, 15

Statutes Cited.

Constitution of the United States, Amendment IV.... 5
Constitution of the United States, Article IV, Sec. 1.. 5
U. S. Code, Title 28, Federal Rules of Civil Procedure:
Rule 8 (f).....9, 10
Rule 54 (c).....9, 10
Rule 60 (b).....4, 5, 6, 9, 11
U. S. Code, Title 28, Sec. 1254 (1)..... 5

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

AUGUSTA M. TURNER,
Petitioner,

vs.

ALTON BANKING AND TRUST COMPANY, Executor of the Estate of August Luer, Deceased,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner, Augusta M. Turner, prays that a writ of certiorari issue to review an order of the Court of Appeals, for the Eighth Circuit, denying petitioner's motion to recall mandate, revoke order overruling petition for rehearing, and for such other relief as to the Court may seem meet and proper.

SUMMARY STATEMENT.

On May 21, 1943, respondent obtained a judgment against petitioner in the Circuit Court of Madison County, Illinois, on a cognovit note, with attached warrant of attorney (R. 1).

Respondent thereafter, on March 13, 1946, brought an action in the District Court of the United States for the Eastern District of Missouri upon this Illinois judgment.

On October 12, 1949, the District Court entered judgment against petitioner, which was affirmed by the United States Court of Appeals, for the Eighth Circuit, on May 1, 1950. Petitioner then filed a motion for rehearing in the Court of Appeals, which was denied on June 19, 1950. **Turner v. Alton Banking and Trust Co. et al.**, 8th Circuit, 181 F. 2d 899, certiorari denied, 340 U. S. 833, rehearing denied, 340 U. S. 885 (R. 21).

The mandate of the Court of Appeals, affirming the decision of the District Court, went forward from the Clerk's office on October 18, 1950.

Petitioner filed her motion to recall mandate for the purpose of inquiring into her allegations of fraud, and filed in support thereof the affidavit of Mr. George G. Swett (Exhibit "A" to Motion, R. 5). In it, Mr. Swett stated that he is an examiner of questioned documents, and was employed by the United States Post Office in that capacity; that he has qualified as an expert witness before federal District Courts in many instances; and that it was his belief that petitioner's purported signature on the cognovit note, upon which jurisdiction of the Illinois Court and the judgments of the federal courts depended, was a simulated forgery and not genuine. The Court of Appeals denied petitioner's motion on January 17, 1951. 186 F. 2d 6.

It is petitioner's contention that her signature on the Illinois cognovit note and warrant of attorney was forged, and that the Circuit Court of Madison County, Illinois, did not acquire jurisdiction over her person by virtue of that signature, and that said judgment is therefore void; further, that said judgment was obtained by fraud in the false representations on the part of the respondent herein,

in that respondent tacitly represented to the District Court and the Court of Appeals that the signature on said note and warrant of attorney was genuine, when in truth and in fact the signature was not genuine but was forged.

The opinion of the Court of Appeals states, in part (R. 22):

> "To sustain her contention that this court may recall its mandate, vacate the order overruling her petition for rehearing, and either direct the district court to take evidence on the question of forgery, or appoint a commissioner to hear the evidence and report back to this court, and that this court may then reverse the judgment of the district court, the appellant relies upon the decisions of the Supreme Court in **Hazel-Atlas Glass Co. v. Hartford-Empire Co.**, 322 U. S. 238, and **Universal Oil Products Co. v. Root Refining Company**, 328 U. S. 575.
>
> "It is true that under certain circumstances 'federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary, at any time,' **United States v. Smith**, 331 U. S. 469, footnote 4, but the exercise of such power must not be in violation of the Fourth Amendment to the Constitution. The cases relied upon by appellant were patent cases, and it is pointed out that the public interest was involved because the fraud perpetrated not only affected the administration of justice in a federal court, but the patent office as well. That is not the situation in the instant case. The fraud alleged here was entirely within the jurisdiction of the Illinois court, and it affects, if true, only that court and the parties to its judgment. The power of a federal appellate court to act on its mandate after the term expires survives to protect against the abuse of the court's own processes under the decision of the Hazel-Atlas case, supra, but it has never been held to survive

for the convenience of litigants. **Fairmont Creamery Co. v. Minnesota**, 275 U. S. 70. In **Cromwell v. County of Sac**, 94 U. S. 351, 352, it was expressly held that '. . . a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment.'

"It is obvious that the appellant is in no position to seek relief against the judgment which this court has affirmed unless and until she has secured the vacation of the Illinois judgment by the court which entered it. See and compare **Indemnity Ins. Co. v. Smoot**, App. D. C., 152 F. 2d 667, 670, cert. den., 328 U. S. 835.

"**Motion denied.**"

The Court of Appeals in this holding has deprived petitioner of a right accorded her in Rule 60 (b), Federal Rules of Civil Procedure, Title 28, U. S. C., which provides in part:

"(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., Sec. 1655, or to set aside a judgment for fraud upon the court. . . ."

And, further, the Court of Appeals has deprived petitioner of the holding of this Court in **Hazel-Atlas Glass Co. v. Hartford-Empire Co.**, 322 U. S. 238.

JURISDICTION.

The order of the Court of Appeals, denying petitioner's motion, was entered January 17, 1951 (R. 23). The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the U. S. Code.

QUESTIONS PRESENTED.

1. Where a *prima facie* showing is made that the judgment rendered by a federal court was procured by fraudulent representations, has the Court **power** under Rule 60 (b), Federal Rules of Civil Procedure, Title 28, U. S. C., to inquire into the merits of the assertion of fraud? The Court of Appeals has answered this question "No."

2. Petitioner has shown *prima facie* that the jurisdiction over her person of the Court which rendered the foreign judgment actually did not exist and was assumed on account of fraudulent misrepresentations. Is such a judgment binding upon federal courts in which suit is brought on such judgment under the Fourth Amendment (sic: Art. IV, Sec. 1) of the Constitution of the United States? The Court of Appeals has answered this question "Yes."

3. Is the jurisdiction given by the decision of this Court in the case of **Hazel-Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238, to set aside a judgment for fraud, unavailable to the Court when invoked, (a) for a fraud perpetrated upon the Court's processes when no other public interest is involved, and (b) "for the convenience of litigants"? This is the verbatim holding of the Court of Appeals.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The opinion and decision of the Court of Appeals is in conflict with Rule 60 (b), Federal Rules of Civil Procedure, Title 28, U. S. C., and with the holding of this Court in the case of **Hazel-Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238, in that it holds a federal court has no power to grant relief from a judgment granted by it which was procured by misrepresentations of fact amounting to fraud.

2. The decision of the Court of Appeals on a federal question is in conflict with applicable decisions of this Court in the following cases:

Adam v. Saenger, 303 U. S. 59;
Cole v. Cunningham, 133 U. S. 107;
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238;
Klapprott v. United States, 335 U. S. 601;
Universal Oil Products Co. v. Root Refining Co., 328 U. S. 575.

The decision is also in conflict with the decisions of the Court of Appeals in the following cases, one of which was decided by the Eighth Circuit:

Assman v. Fleming, 159 F. 2d 332;
Fiske v. Buder, 125 F. 2d 841 (Eighth Circuit);
Indemnity Insurance Co. v. Smoot, 152 F. 2d 667;
Oliver et al. v. City of Shattuck ex rel. Versluis, 157 F. 2d 150;
Root Refining Co. v. Universal Oil Products Co., 169 F. 2d 514;
Saenz et al. v. Kenedy et al., 178 F. 2d 417.

CONCLUSION.

It is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

LON HOCKER,
Attorney for Petitioner.

JONES, HOCKER, GLADNEY & GRAND,
CHASE MORSEY,
WILLIAM M. SMITH,
Of Counsel.

INDEX.

	Page
Petition for writ of certiorari	1-7
Summary statement	1
Jurisdiction	5
Questions presented	5
Reasons relied on for allowance of writ	6
Conclusion	7
Brief in support of petition	8-19
Index	8
Opinion below	8
Jurisdiction	8
Specification of errors	8
Argument	9
Conclusion	19

Cases Cited.

Adam v. Saenger, 303 U. S. 59 ..... 6, 14

Assman v. Fleming, 159 F. 2d 332 ..... 6, 11

Briggs v. Pennsylvania R. Co., 334 U. S. 304 ..... 17, 18

Cole v. Cunningham, 133 U. S. 107 ..... 6, 14

Fairmount Creamery Co. v. Minnesota, 275 U. S. 70 .. 17

Fiske v. Buder, 125 F. 2d 841 ..... 6, 12

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238 ..... 5, 6, 15, 16, 17

Indemnity Insurance Co. v. Smoot, 152 F. 2d 667 ..... 6, 14

Klapprott v. United States, 335 U. S. 601 ..... 6, 11

Ledwith v. Storkan, 2 F. R. D. 539 11

BRIEF

In Support of Petition for Writ of Certiorari.

INDEX.

The index appears preceding this petition.

OPINION BELOW.

The opinion of the Court of Appeals (R. 21 to 23) is reported at 186 F. 2d 6.

JURISDICTION.

The jurisdictional statement appears in the petition for the writ (supra, 5).

SPECIFICATION OF ERRORS.

The assigned errors that petitioner intends to assert are that the Court of Appeals erred in denying her motion (R. 23) for the reasons relied on for allowance of the writ set out in the petition for the writ (supra, 6).

ARGUMENT.

A.

In support of her motion petitioner filed the affidavit of a handwriting expert that the signature on which jurisdiction was founded and judgment rendered was a forgery (R. 5, 6). This constitutes a *prima facie* showing that the judgment rendered by the Federal District Court and affirmed by the Court of Appeals was procured by fraud. The Court of Appeals, in its decision, supra, 3, 4, has concluded that it had no power to inquire into the merits of the assertion of fraud. This conclusion was erroneous. The assertions of fraud by petitioner were sufficient to bring the motion within the terms of the amended Rule 60 (b), Federal Rules of Civil Procedure, Title 28, U. S. C., which provides in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void: . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court . . ."

As a general proposition under the federal statutes, a party will be given the relief to which he is entitled regardless of the form of his pleadings. This is accorded by virtue of Rules 8 (f) and 54 (c), Federal Rules of Civil Procedure, Title 28, U. S. C., which provide:

Rule 8. General Rules of Pleading:

> "(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

Rule 54. Judgments; Costs:

> "(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

And in a decision which defined the scope of relief from a judgment, the court, in **Oliver et al. v. City of Shattuck ex rel. Versluis**, 157 F. 2d 150, 152, held:

> "Without pains to label the form of the action or the remedy, courts have never hesitated to grant equitable relief against a judgment, if to execute it would give the judgment creditor an unconscientious advantage procured through his own fraud or some excusable mistake, or unavoidable accident on the part of the judgment debtor. Freeman on Judgments, Vol. 3, Sec. 1213, p. 2519; Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 248, 64 S. Ct. 997, 88 L. Ed. 1250."

The court in the **Oliver** case decided, at page 152, that if a party could not obtain relief from a judgment by virtue of Rule 60 (b), "the court was not limited to this remedy in determining whether relief against the judgment should or could be granted."

In the same manner, petitioner is entitled to relief under her motion, whether such relief is to be accorded by virtue of Rule 60 (b) or by virtue of the motion being

characterized as an independent action. If either form of remedy warrants relief from the judgment, petitioner cannot be denied her motion.

Rule 60 (b) does not assume to define the substantive law as to the grounds for vacating a judgment. See Notes of Advisory Committee on Amendments to Rules, following Rule 60, Federal Rules of Civil Procedure, Title 28, U. S. C. It is within the judicial discretion of the Court of Appeals to grant or deny petitioner's motion. **Assman v. Fleming**, 159 F. 2d 332, 336. However, there has been some limitation placed upon the scope of a court's discretion in this regard. In **Ledwith v. Storkan et al.**, 2 F. R. D. 539, 545, it was held:

> "It is true that, upon adequate showing, the court's discretion should ordinarily incline towards granting rather than denying relief, especially if it be manifest that no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue. And reported decisions under the rule reflect the pursuit of that practice."

The Court of Appeals did not base its decision on a discretionary finding that petitioner's showing of fraud was insufficient to warrant *prima facie* her requested relief. Instead, it held that it had neither the power to investigate the allegations of petitioner nor to inquire into the assertions of fraud. This holding cannot be reconciled with case decisions that have defined the scope of Rule 60 (b), as above quoted.

In **Klapprott v. United States**, 335 U. S. 601, 609, this court considered amended Rule 60 (b), effective March 19, 1948, and stated:

> "In some respects the amended rule grants courts a broader power to set aside judgments than did the

old rule. Petitioner should be afforded the benefit of the more liberal amended 60 (b)."

On a prior occasion, the Court of Appeals for the Eighth Circuit considered old Rule 60 (b) in **Fiske v. Buder,** 125 F. 2d 841. They held at page 845:

> "Applying the construction thus placed upon the California statute to Rule 60 (b), the district court had power to decide the issue presented by the motion and answer provided the fraudulent representations alleged constitute extrinsic fraud. That question may be discussed more appropriately hereinafter in connection with our decision on the merits of the controversy. Our conclusion there is that the alleged fraud is extrinsic or collateral. **We hold, therefore, that the district court had power to hear and determine the issues.** See, also, Preveden v. Hahn, D. C. S. D. N. Y., 36 F. Supp. 952, 953." (Emphasis added.)

It is to be noted that Rule 60 (b), as amended, has abolished the distinctions between extrinsic and intrinsic fraud. Today the court could hear and determine the issues whether the fraud be extrinsic or intrinsic. Yet the **Fiske** case, prior to the liberalizing amendment, held that the rule gave the court the power which the Turner case, after the liberalizing amendment, denies.

In **Saenz et al. v. Kenedy et al.,** 178 F. 2d 417, 419, the court quoted portions of amended Rule 60 (b) and then stated:

> "We are fully aware of the salutary rule that courts can and should set aside any judgment or decree that was procured by fraud, but we are also aware of the fact that fraud is never presumed and must always be proven by clear and convincing evidence. There is no testimony in this case to prove those allegations and there is nothing in the record, other than the legal

conclusions of the pleader, as to any fraud or collusion between Court and counsel for defendants."

In the case at bar, petitioner supported her allegations of fraud in the only way open to her—by the affidavit of a qualified handwriting expert, that both the jurisdiction of the Illinois court and the judgment itself, were procured by a forged signature. The Court of Appeals was in error when it denied its power, under Amended Rule 60 (b), to inquire into the merits of petitioner's assertion of fraud.

B.

In its opinion the Court of Appeals acknowledged the power of a federal court to investigate whether a judgment was obtained by fraud, and then qualified this power by stating (R. 22):

> "But the exercise of such power must not be in violation of the Fourth Amendment to the Constitution" (Supra, 4).

It also stated that (R. 22):

> "The fraud alleged here was entirely within the jurisdiction of the Illinois court, and it affects, if true, only that court and the parties to its judgment."

Then the court concluded by holding (R. 23):

> "It is obvious that the appellant is in no position to seek relief against the judgment which this court has affirmed unless and until she has secured the vacation of the Illinois judgment by the court which entered it. See and compare Indemnity Ins. Co. v. Smoot, App. D. C., 152 F. 2d 667, 670, cert. den., 328 U. S. 835."

This language undoubtedly refers to Article IV (not amendment IV), which provides:

> "Section 1. Full Faith and Credit Shall Be Given in Each State to the Public Acts, Records, and Judicial Proceedings of Every Other State. And the

> Congress May by General Laws Prescribe the Manner in Which Such Acts, Records, and Proceedings Shall Be Proved, and the Effect Thereof."

The court holds that this provision makes a judgment, procured by fraudulent representations affecting jurisdiction of the person, binding upon the federal court in which suit is brought upon such judgment.

This is not the law.

The case of **Indemnity Ins. Co. v. Smoot**, 152 F. 2d 667, 669, cited in the above quoted portion of the opinion, states:

> "It is fundamental that in an action on a judgment the original cause of action cannot be examined on the merits, the area of attack being limited to jurisdiction and **fraud in procurement.**" (Emphasis added.)

The proposition was succinctly set out in **Adam v. Saenger**, 303 U. S. 59, 62, by Mr. Justice Stone, where he said:

> ". . . If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. Hanley v. Donoghue, 116 U. S. 1; Knowles v. Gaslight & Coke Co., 19 Wall. 58; Settlemier v. Sullivan, 97 U. S. 444. But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry, Chicago Life Insurance Co. v. Cherry, 244 U. S. 25, and **when the matter of fact or law on which jurisdiction depends was not litigated in the original suit it is a matter to be adjudicated in the suit founded upon the judgment.** Thompson v. Whitman, 18 Wall. 457." (Emphasis added.)

See also,

Cole v. Cunningham, 133 U. S. 107, 112.

It must be particularly emphasized that neither the Illinois Court nor the Federal District Court, whose judgment was affirmed by the Court of Appeals, made any adjudication of petitioner's present allegations of fraud in the procurement of the judgment. A judgment procured by fraud is not binding upon a federal court when suit is brought on such judgment. The Court of Appeals was in error in making a determination that they were bound to give the Illinois judgment full faith and credit under the scope of petitioner's motion.

C.

As previously noted, supra, 10, 11, petitioner is entitled to relief under her motion if she has either, (a) brought herself within the provisions of Rule 60 (b) or, (b) brought herself within the substantive law warranting relief in an independent action. In this latter aspect petitioner relied upon the cases of **Hazel-Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238, and **Universal Oil Products Co. v. Root Refining Co.**, 328 U. S. 575. She cited them for the proposition that the Court of Appeals has the power and is under a duty to investigate an allegation that a judgment was affirmed because of a fraud perpetrated upon that court; and further, that this power and duty survive after the term ends (R. 6).

Petitioner contends that should this court find she has not been improperly denied her rights by the Court of Appeals under Rule 60 (b), she was nevertheless improperly denied the benefit of the holding of the **Hazel-Atlas** case, which was an independent action for relief from a judgment procured by fraud. The Court of Appeals has qualified the **Hazel-Atlas** decision to mean: first, there should be some additional public interest involved in the suit before the court has power to investigate a fraud perpetrated upon the court's processes; and, second, this

power "has never been held to survive for the convenience of litigants" (R. 23).

Both of these qualifications are unjustified under the applicable substantive law.

The **Hazel-Atlas** case involved a fraud upon the United States Patent Office as well as a fraud upon the court. The language of this court clearly indicated that the former fact was not the basis for the decision. To the contrary, this court was of the opinion that fraud upon the court demands the exercise of the traditional equity power of a court to set aside a judgment obtained by reason of such fraud. The opinion stated at page 247:

> "We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered."

Such language cannot be interpreted to mean that these "settled equitable principles" apply **only** when some additional public interest, i. e., fraud upon the Patent Office, is involved. The court, in **Root Refining Co. v. Universal Oil Products Co.**, 169 F. 2d 514, 521, clearly stated the power of a court to act when they said:

> "**This argument completely ignores the inherent power of a court to inquire into the integrity of its own judgments.** Such a judgment implies the prior existence of a justifiable case or controversy between opposing litigants; but when the controversy has been terminated by a judgment, its freedom from fraud may always be the subject of further judicial inquiry; and the general rule that courts do not set aside their judgments after the term at which they were rendered

has no application. The matter is not one of merely private concern subject to the action or inaction of the litigants, but is one of vast public importance, so that it becomes immaterial that the injured party may have been derelict in bringing the fault to the court's attention." (Emphasis added.)

This first qualification placed upon the **Hazel-Atlas** decision by the Court of Appeals was error prejudicial to a proper consideration of petitioner's motion.

The Court of Appeals has stated (R. 22, 23):

"The power of a federal appellate court to act on its mandate after the term expires survives to protect against the abuse of the court's own processes under the decision of the **Hazel-Atlas** case, supra, but it has never been held to survive for the convenience of litigants."

Petitioner does not object to the correctness of this statement, but, rather, she objects to the misapplication which the Court of Appeals has given it. It has failed to distinguish between two fundamental situations underlying the truth of the above-quoted portion of its opinion, and for that reason has erroneously denied petitioner's motion. The first situation, as illustrated by the **Hazel-Atlas** case, supra, is the case wherein an abuse of the court's processes occurs and such abuse operates ultimately to the convenience of the litigants. That is the petitioner's case as alleged in her motion. The second situation arises when there has been no abuse of the court's processes and the setting aside of a judgment after term would operate only for the convenience of litigants.

The case of **Fairmount Creamery Co. v. Minnesota**, 275 U. S. 70, cited in the Court of Appeals opinion, illustrates this second situation, as does the case of **Briggs v. Penn. R. Co.**, 334 U. S. 304. In the **Fairmount Creamery Co.**

case, the Creamery Co. was charged and convicted of an offense under a Minnesota statute, which conviction was affirmed by the Minnesota Supreme Court. On appeal to this court, the judgment was reversed because of the unconstitutionality of the Minnesota statute. After the term had ended and the mandate had issued, the State of Minnesota filed a motion to retax costs. This court denied the motion because it would act to amend the judgment, as approved by the court, after the term had ended.

There was no fraud upon the court involved. Had this court granted the motion to retax costs, it would have been exclusively for the convenience of litigants.

The **Briggs** case, supra, was an action under the Federal Employers' Liability Act. A jury verdict for the plaintiff in the District Court was set aside by the District Court on the basis of lack of jurisdiction. The Court of Appeals reversed and directed that judgment be entered on the verdict. The District Court entered judgment with interest. No mention of interest had been made in the Court of Appeals mandate. The Circuit Court of Appeals modified the District Court judgment by excluding interest. It was held that an inferior court cannot exceed the mandate of the appellate court. Enlargement of the amount would have to be made by amendment to the mandate during term of court. The plaintiff had failed to move for amendment of the mandate during the term of court, and, since the right to act on a mandate after term does not exist for the "convenience of litigants," his rights were ended. The court said, at page 306:

> "While power to act on its mandate after the term expires survives to protect the integrity of the court's own process, Hazel-Atlas Glass Co. v. Hartford Co., 322 U. S. 238, it has not been held to survive for the convenience of litigants. Fairmount Creamery Co. v. Minnesota, 275 U. S. 70."

No fraud upon the court was involved. Any act by the court to disregard the mandate, after the term had ended, would have been exclusively for the convenience of litigants.

It is submitted that neither of these cases is in point because petitioner has made a prima facie showing that there was a fraud perpetrated upon the Court of Appeals. That court did not make a finding that there had been no fraud on their processes. Instead it held that such an action as this does not "survive for the convenience of litigants." The fallacy of its reasoning appears in that the Court of Appeals has relegated petitioner's case to the second situation above noted without having found that there was no fraud perpetrated upon its processes. In short, the Court of Appeals has assumed, without deciding, a primary fact in issue. This was error prejudicial to a proper consideration of petitioner's motion.

The petitioner contends that the Court of Appeals has erred in its determination and application of the statutory and substantive law involved and thereby has improperly denied her motion.

It is respectfully requested that the writ of certiorari issue to correct the error in the record of this motion.

Respectfully submitted,

LON HOCKER,
Attorney for Petitioner.

JONES, HOCKER, GLADNEY & GRAND,
CHASE MORSEY,
WILLIAM M. SMITH,
Of Counsel.